S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 246417 Wayne Circuit Court
WILLIAM MOTTEN, JR., Defendant-Appellant.	LC No. 01-009240

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of assault with intent to commit murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to twenty-three years and nine months to fifty-eight years and four months' imprisonment for the assault with intent to commit murder convictions and three to five years' imprisonment for the felon in possession of a firearm conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for reconsideration of defendant's sentence in light of *Blakely v Washington*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___; 2004 WL 1402697 (United States Supreme Court Docket No. 02-1632, decided June 24, 2004).

I. Sufficiency of the Evidence

Defendant first challenges the sufficiency of the evidence supporting his convictions for assault with intent to commit murder. When reviewing the sufficiency of the evidence in a criminal case, the Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The standard of review for the sufficiency of evidence is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000).

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels,* 237 Mich App 168, 181; 603 NW2d 95 (1999). Defendant argues that there is insufficient evidence to prove that he intended to kill the victims.

> Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. All conflicts in the evidence must be resolved in favor of the prosecution. This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. [*Id.* (citations omitted).]

Here, defendant was playing craps at a private club and became angry over a bet. Later, he pulled out a handgun and began firing into the air. After two bystanders grappled with defendant, defendant shot Charles Mickle, the doorman, in the leg and abdomen. A witness described defendant as shooting multiple shots "just like he was target practicing." Defendant left the house and returned a short time later, when he shot Lorenzy Henson, the club's owner, in the abdomen. Hensen described how defendant looked him in the eyes before he shot him. Sometime during these events, Edward Jarette, who had been hired to watch peoples' cars, was fatally shot in the chest.[1] From this evidence, a reasonable juror could infer that defendant intended to kill Mickle and Hensen when he shot them. The prosecution introduced sufficient evidence to support defendant's convictions of assault with intent to commit murder.

II. Double Jeopardy

Next, defendant argues that his convictions, which were the result of his third trial regarding the same charges, were violative of double jeopardy. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Kulpinski,* 243 Mich App 8, 11-12; 620 NW2d 537 (2000). Both the United States and the Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2003); *People v Barber*, 255 Mich App 288, 291-292; 659 NW2d 674 (2003). The Double Jeopardy Clause of the Fifth Amendment protects against multiple punishments for the same offense and multiple prosecutions for the same offense. *Herron, supra* at 599; *Barber, supra* at 292.

Defendant argues that his convictions stemmed from multiple prosecutions for the same offense, because the trial court, in defendant's two previous trials, declared mistrials after erroneously determining that the juries were deadlocked. Therefore, necessarily intertwined with the constitutional double jeopardy issue in this case is the threshold issue whether the trial court properly declared a mistrial. *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002). The trial judge's decision to discharge a jury when it concludes that the jury is deadlocked is reviewed for an abuse of discretion. *Id.* at 213, 219-220 n 12. Our Supreme Court has consistently held that retrial after a mistrial caused by jury deadlock does not violate double jeopardy protections. *People v Thompson*, 424 Mich 118, 128; 379 NW2d 49 (1985). "When a mistrial is declared on the basis of juror deadlock, double jeopardy interests will rarely, if ever, be implicated, because

[1] Defendant was charged with the first-degree murder of Jarette. In his first trial, defendant was acquitted of the first-degree murder charge.

jeopardy 'continues' following the mistrial declaration." *Lett, supra* at 219 n 11. In *Lett, supra* at 221-222, our Supreme Court explained:

> Consistent with the special respect accorded to the court's declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock, nor have we ever required that the judge conduct a "manifest necessity" hearing or make findings on the record. In fact, we long ago stated that, "[a]t most, . . . the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict*." Moreover, the United States Supreme Court has expressly indicated that the failure of a trial judge to examine alternatives or to make findings on the record before declaring a mistrial does not render the mistrial declaration improper. Instead, where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. [Citations omitted; italics in original.]

Here, defendant was originally tried on the charges of first-degree murder, two counts of assault with intent to commit murder, felon in possession of a firearm, and felony-firearm. At the end of the first day of deliberations, the jury sent a note to the trial court stating, "We know that we will not be unanimous on any given count." The next day, the trial court gave the jury a deadlocked jury instruction, and told the jury to resume deliberations. The jury returned a verdict of "not guilty" on the first-degree murder charge, but stated that it had not reached a verdict on the other charges, so the trial court declared a mistrial and dismissed the jury.

Defendant was retried on the remaining charges. On the first day of deliberations of defendant's second trial, the jury sent several notes to the trial court indicating that it was deadlocked. On the second day of deliberations, the trial court gave the jury a deadlocked jury instruction. The jury later indicated to the trial court that it was deadlocked and would not be able to reach a unanimous verdict on any of the charges. When one juror indicated that rehearing the testimony of one of the witnesses might aid deliberations, the trial court had a portion of the testimony replayed and excused the jury to continue deliberating. Seven minutes later, the jury passed a note to the trial court again indicating that the jury was deadlocked and that it would not be able to reach a unanimous verdict. The trial court declared a mistrial, dismissed the jury, and disqualified himself from the case.

Under these circumstances, the trial court did not abuse its discretion in declaring mistrials in the first two trials. In both of the first two trials, the jury indicated that it was not going to be able to reach a unanimous verdict. Both times, the trial court gave a deadlocked jury instruction and encouraged the jury to continue deliberating, but the juries again expressed that they would not be able to reach a verdict. "This Court long ago indicated that 'the court is justified in accepting [the jury's] statement that [it] cannot agree as proper evidence in determining the question.' " *Id.* at 223 n 17, quoting *People v Parker*, 145 Mich 488, 502; 108 NW 999 (1906). Accordingly, the trial court did not abuse its discretion in finding that there was manifest necessity to discharge the juries, and defendant's third trial did not constitute a constitutionally impermissible successive prosecution. Defendant has not shown a plain error affecting his substantial rights.

III. Evidence of Edward Jarette's Death

Defendant next argues that the trial court abused its discretion when it permitted the prosecution to present evidence of Jarette's shooting death to the jury. The trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). When the underlying decision involves preliminary questions of law, such as whether a rule of evidence precludes admission, the question is reviewed de novo. *Id.*

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For other acts evidence to be admissible, the following factors must be present: (1) the prosecutor must offer the evidence under something other than a character or propensity theory; (2) the evidence must be relevant under MRE 402, as enforced through MRE 104(b); and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant argues that the evidence of Jarette's death did not support the inference that defendant intended to murder Mickle or Hensen, so it was not offered for any relevant purpose other than to show defendant's propensity to attempt to murder. We disagree. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Although defendant is correct that there was no direct evidence that he shot Jarette, there is ample circumstantial evidence from which the jurors could have concluded that defendant shot him. Significantly, defendant was the only person seen wielding, and later firing, a handgun at Henson's club. Evidence of Jarette's fatal shooting was part of the res gestae of the crime.

> "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964); *People v Wardwell*, 167 Cal App 2d 560; 334 P2d 641 (1959); McCormick on Evidence (2d ed), § 190."

Stated differently:

> " 'Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.' " *State v*

Villavicencio, supra at 201. [*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).]

The shooting of Jarette, Mickle, and Henson occurred as part of a single incident. Evidence of Jarette's fatal shooting is necessary to understand the circumstances surrounding the shootings of Mickle and Hensen. Additionally, Jarette's fatal shooting is also probative of defendant's intent to murder, as it shows that defendant was more likely to have intended to murder Mickle and Hensen if he fatally shot Jarette.

Defendant also argues that the unfair prejudice associated with the admission of Jarette's death outweighed any probative value. However, "[t]he fact that evidence is damaging and harms the opposing party does not indicate that it is unfairly prejudicial." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996), aff'd 457 Mich 593; 580 NW2d 817 (1998). Any relevant evidence will be damaging to some extent. Rather, as our Supreme Court pointed out, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Evidence of Jarette's death is not marginally probative evidence in that it is necessary to show the events surrounding the shooting at Henson's club, and it is relevant to establishing defendant's intent in regard to the shootings of Mickle and Hensen. The trial court gave the jury a limiting instruction regarding the evidence of Jarette's death, instructing the jury that it could only consider this evidence to understand the sequence of events that led to the shootings and to show that defendant intended to murder Mickle and Hensen—not show defendant's character or his propensity to commit crimes. Juries are generally presumed to follow their instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Therefore, we conclude that the probative value of evidence of Jarette's death was not substantially outweighed by the danger of unfair evidence, and the trial court did not abuse its discretion in admitting this evidence.

IV. Sentencing

Finally, defendant argues that the trial court improperly scored one hundred points for offense variable (OV) 3, MCL 777.33. MCL 777.33(1)(a) provides that a defendant should be scored one hundred points for OV 3 if a victim is killed. One hundred points should be assessed "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b). Defendant argues that he should not have been scored points under OV 3 for Jarette's death, because he was acquitted of the charge of murdering Jarette. In *Blakely, supra*, the United States Supreme Court recently addressed the constitutionality of statutory guideline sentences based on judicial factual findings. Because *Blakely* was decided too recently for the parties to address this decision in their appellate briefs, it was not properly presented for appeal. Therefore, we remand this issue to the trial court for reconsideration of defendant's sentence in light of *Blakely, supra*.

Affirmed, but remanded for reconsideration of defendant's sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder